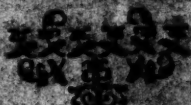


ESSAY
ON THE
MIDDLESEX ELECTIONS
IN WHICH THE
POWER
OF
EXPULSION

Is particularly considered.



LONDON:

Printed for BENJAMIN WHITE, at Horace's Head,
in Fleet-Street.

MDCCLXX

[Price One Shilling]

ESSAYS
ON THE
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IN WHICH THE
POWER
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EXPUSSION

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By

LONDON:

Printed for Benjamin Warr, at Leonard's Head,
in Pall-mall.

MDCCLXX.

[This One Selling]



A N

ESSAY

ON THE

Middlesex Election, &c.

WHEN parties are heated,
W even in the most frivolous
contests, a fair dispassionate
enquiry after truth is little
to be expected. Whatever opinion is
embraced and defended by one side,
becomes the object of abhorrence with
the other; and should any interest of

B

private

private ambition coincide with this political furor, Truth, Justice, and the great interests of the community are equally sacrificed, which ever party may finally prevail.

Singular as the opinion may seem, I cannot help thinking, that the true source of error, respecting the late *Middlesex* Election, has not yet been pointed out. The case is new, and difficult. The best and ablest men have thought differently on the subject; but as every question respecting Government hitherto agitated in this country, has given occasion to an improvement of our constitution, by defining more accurately the rights and privileges of some one Order of the State; so, I trust, this usual good fortune will not now forsake my countrymen; but that in the present instance, any power,
 2 even

even though vested in the Representatives of the people, will with general consent be done away, if it shall be found inconsistent with the acknowledged fundamental constitution of our regular limited Monarchy.

The Government of this country has undergone a signal revolution within a century and an half. The great outlines of the Constitution, which before that time lay in a kind of chaos, obscured by ignorance, or overborne by violence, were then first brought to light, and defined. The progress of literature, and a more general acquaintance with the bold genius of antiquity, begot a spirit of enquiry, which, spreading under the shade of puritanical absurdities, deemed no subject too sacred for its researches, and though the prevalence of these

latter principles, broke down for a time
 all the barriers of law, we are indebted
 to the struggles hence produced for
 that noble liberty, that sweet equality,
 and that happy security, by which the
English are at present distinguished
 above all the nations of the universe.
 Great and glorious as the system of
 laws then established must appear, it
 lies not within the compass of the
 human mind, previously to define all the
 rights of the several orders of the State.
 A perfect Government (if perfection is
 attainable on earth) must be the growth
 of ages among the most enlightened
 people. All that human wisdom can
 perform, is to watch over it with
 care; and, when events have disco-
 vered some latent defect, or the par-
 ticular exercise of some power hereto-
 fore deemed legal has shewn it incom-
 patible with the essential acknow-
 ledged

ledged parts of the constitution, to supply the one, or remove the other. From such patient touches of art have arisen those two beautiful systems of municipal law, which induced the President *Montesquieu* to call the *English* and *Romans* the great Legislators among nations. And from the like causes must be gradually formed every political fabric which can promise security to the subject or permanency to itself. Every alteration therefore is not a rash innovation; and if the author of the following sheets should advance any thing which at first sight may appear extravagant, or unusual, he hopes to be judged only from a perusal of the whole.

The business of the *Middlesex* Election may fairly be divided into three distinct propositions. Have the House
of

of Commons a power to expel? Does Expulsion create incapacity? If a candidate be incapable, does it thence follow that his antagonist, with a smaller number of votes, ought to be admitted? In determining the two latter questions, the House clearly acted in a judicial capacity. These are questions incident to the several Elections, which it was incumbent upon the House to decide, and over which they are acknowledged on all hands to have a sole exclusive jurisdiction. If they were mistaken, to what court of appeal shall we resort? None such is known to the constitution: None such can ever be established without overthrowing that independence of the House, on which the stability of our Government must depend. As well might the people rejudge every election as the present. Where the general power is
rightly

rightly lodged in proper hands, the *particular* exercise of such power must always be submitted to, though sometimes wrong, or every particular question may involve a revolution in the State. What if these decisions should moreover appear to have been made upon the clearest principles of justice, and perfectly analogous to the judgments of courts of law?

Should these points be clear, another yet remains, which alone can be important to the public, because it respects the *general* distribution of political power, and not a *particular* exertion of acknowledged authority. Let us first examine the two judicial questions (which, as they are of the least importance, will be found less difficult to determine,) that we may return
totally

totally unembarrassed to the more weighty consideration.

In every community, where laws are enacted, there must be some mode of compelling the execution; and in free countries the most natural, and least oppressive, will ever be preferred. The law says, an Election of a particular magistrate shall be made on a certain day; who can oblige the people to proceed to a choice? Shall neglect of attendance be the object of criminal animadversion? This would render privileges intended for protection the most grievous burthen upon the subject, if compulsively exercised; or, if neglected, the means of

It is sufficient for the purpose of protection, to have a right of voting whenever the freeholder sees occasion to exercise it.

oppressing

oppressing individuals. The nature of the transaction points out the remedy. Let a day and hour be appointed; let due notice be given; let all having a right to vote be admitted, and the resolution of the majority *present* be deemed the sense of the whole. Again, the law requires a certain qualification in the Candidate; for instance, an Estate of a certain yearly value, that may be presumed to make the possessor independent. The Electors have fixed their wishes on a person not so qualified. What is to be done? Shall the head-strong will of those, who pretend not to legislative power, render the law a dead letter? Shall they in effect repeal it? If the Election is void, we recur again to the former difficulty. No Election will be made. It becomes necessary therefore to carry the same principle one step further, and to con-

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sider those who *wilfully* vote for an unqualified Candidate as not voting at all. If the law is thus liberally construed, that none suffer but with their eyes open, where is the hardship? Their right of suffrage is acknowledged; but if an Elector obstinately refuses to exercise this right in conformity to law, his act being illegal, is considered as void, and he is just in the situation of a man who had altogether neglected to attend.

This reasoning will be strongly corroborated, by reflecting, that, according to the first principles of our constitution, a Candidate once chosen, instantly loses all particular connection with his Electors. He is bound to consult the general interests of the community at large, and is in truth equally the Representative of the whole Kingdom. The people of *Great*

Britain are to be governed by the *whole* representative Body. They have a perfect right to expect this Body shall be full, because they consent not to be governed by a lesser * number. A county therefore refusing to send a Representative to Parliament, does an injury to the whole Kingdom.

* If it be said that the Representative Body can never be fully complete; that vacancies must perpetually happen from deaths and other causes: We readily acknowledge the truth of this observation, and that the necessity of dispatching public business requires the House should sit and act, notwithstanding these *accidental* vacancies. But this does not in any degree impeach the general principle, that a new Election should always be had as soon as may be, consistently with the forms requisite to prevent surprize. Some Members likewise will ever be absent; and it might be difficult to find men of independent fortunes willing to accept the trust, if some excuses were not allowed. We must acknowledge therefore as lawful the authority of those regularly assembled, and leave the care of compelling attendance to the House itself.

It does not even rest here: the question was not new, either in Parliament, or Westminster-Hall. It had already been adjudged, *that votes given to an unqualified person were absolutely thrown away, and that the first qualified candidate upon the poll was duly chosen.* In the two cases of Serjeant Comyns and Mr. Ongley, by the House of Commons; in Westminster-Hall, by the ablest Lawyers * that ever sat on the bench of justice.

That an unqualified candidate is no candidate; and that votes given to the Pope, or any other person incapable by law of receiving them, are absolutely null and void, appear points so

* By Lord Hardwicke, &c. in the case of the King and *Wilbers*; by Lord Chief Justice *Lee*, &c. in the King and Aldermen of *Bath*. In the arguments upon this last case another authority was mentioned.

incon-

incontestible, that it is vain to reason with a man whose understanding does not readily comprehend them. Whether incapacity follows expulsion, or not, seems a question of somewhat more difficulty. Here the opponents of the measure have chosen to make their stand. To determine, say they, this question in the affirmative, must shake the very foundations of public security, and threaten to annihilate the rights of all the Electors in *Great-Britain*. Had they denied the original power to expel; the practice, if invalid, was an error of two centuries hitherto unquestioned and unexamined. If the power existed, Mr. *Wilkes* was a proper object for its exercise. Here would have been no room to represent their enemies as the enemies of the constitution, themselves as the only defenders and protectors of our rights.

They

They admit therefore the power unlimited, yet deny the most necessary consequence; and hence arises all that sophistry in argument, that jargon and nonsense, which have distracted the minds of the people.

The great source of error in all the arguments urged by the minority, and their partizans without doors, is, not sufficiently distinguishing different questions perfectly distinct in their own nature, and the capacity in which the House decides upon each. Thus the author of an ingenious * pamphlet labours through several pages, to prove Mr. *Wilkes* under no legal disability previous to the vote of expulsion. No mortal ever thought it. He continued a member several months: nay, the House of Commons, by the very act of expulsion, acknowledge him as such.

His

* Question stated, &c.

His disability to be re-elected, must stand or fall upon very different grounds.

The House of Commons is the sole court of judicature in cases of election. This authority is derived from the first principles of our government, viz. the necessary independence of the three branches of the legislature. Did any other body of men possess this power, members might be obtruded upon the House, and their resolutions might be influenced under colour of determining elections. They have therefore an exclusive jurisdiction, and must be in these cases the dernier resort of justice.

Upon Mr. *Wilkes's* re-election, it became a doubt, whether disability necessarily flowed from expulsion? The merits

merits of the election depended upon this question ; and a considerable majority declared the election void. This judgment of a tribunal *solely* * competent to decide, must now be submitted to, until King, Lords, and Commons, jointly (in whom alone resides the supreme power of the State) shall think fit to interpose, if we mean not to dissolve the bands of government, by an appeal to the collective body of the people.

But it is asked, with an air of triumph, under what head of legal

* The same ingenious writer abovementioned, is displeased with a feeble attempt to distinguish between *creating* and *declaring* law. The distinction is *solid* and *essential*. The one is an exercise of *will* without rule ; the other, of *judgment* guided by precedent. The one is a legislative, the other a judicial act. An inattention to this, has caused infinite confusion.

dis-

disability, is this consequence of expulsion to be found? How are the electors to know it? I answer, from the records of parliament. How have they learnt, that Judges of the superior courts, cannot be chosen representatives of the people? How are aliens? How are clergymen disqualified? The House has adjudged them incapable, as the several questions occurred. The exact period when a man shall be allowed to manage his own affairs, and to make contracts, seems to be merely arbitrary. No good reason, perhaps, can be given for the succession of the elder brother, or the total exclusion of the half blood. Yet the period of twenty-one years, has been acknowledged the age of discretion; and the claim of the elder brother submitted to as law, from the decisions of our courts of justice; because these have

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hitherto

hitherto stood unaltered & by parliament. Why then shall the House of Commons, *acting within their jurisdiction*, have less authority than the courts of Westminster-Hall? Are the representatives of the people the only court whose determinations are to be treated with contempt?

It is said, "the right of voting is a legal right; it is not given, and

This is a full answer to all arguments drawn from acts of parliament disqualifying officers in the customs, &c. The interposition of the legislature, can only be necessary to alter the known law, or proper to declare the law, before any particular case occurs. When such case happens, it is the peculiar province of Judges to decide. Even in acts reversing the law thus established, regard is always had to the individual, whose right has been once declared by the proper judicature. So tender is the legislative power, in a free country, of encroaching upon the judicial!

" cannot

"cannot be taken away by the *occasional will* of either house of parliament." Who ever maintained a contrary doctrine? But are not limitations of this right perpetually *declared*, and made known by the judicial determinations of the House? Do not frequent instances of this occur in election causes? Are not these resolutions binding upon the whole kingdom, even to disfranchise supposed freemen? The decisions of the House must be conclusive upon all the world, and as such have been acknowledged by the legislature *.

* See the Stat. 2 Geo. II. c. 24, which enacts, that the right of voting in each place, for the future, shall be allowed according to the last determination of the House of Commons concerning it. It is remarkable that this was considered by the legislature as a limitation, not an enlargement, of the power of the House.

D 2 Should,

Should, however, the late determination be found erroneous, the mistake can by no means be imputed to the present House of Commons. As a court, they have strictly conformed to precedent. The case of Sir *Robert Walpole* is fully in point to prove, that a member once expelled, cannot be re-elected during the same parliament. An objection has indeed been drawn from the words "for a high breach of trust, and notorious corruption," inserted in the resolution; as if this were the sole cause of incapacity; but this construction will appear to the last degree trivial and ridiculous. The House admitted him to be a member by the very act of expulsion. Would he otherwise have been committed to the Tower? Would not his punishment have been left to the courts of law? Had disability been the consequence of his *crime*, this disability would

would have been equally valid and efficacious during life. The effect must be equally permanent with the cause. How then did he sit in subsequent parliaments? His rank and situation prevent a suspicion, that he derived his security from the inattention of adversaries.

It is an admirable maxim in our Law, that the authority of precedents, though erroneous in principle, (if none contrary appear) should ever be submitted to, rather than those land-marks be removed, by which the people are enabled to know, and to defend their rights. The exercise of will in a judge is tyranny; and should he once be allowed to deviate from the *established* law, there can be no end of innovation: the known foundations of law once loosened, the rule of right must perpetually vary with the varying

ing conscience of the judge. Admirably as this maxim is calculated to secure the liberty and property of the subject, we need not have recourse to this great corner-stone of jurisprudence in the present instance. The precedent itself stands upon the most solid principles of justice and law. It is not pretended that the power of expulsion is limited to the first, second, or third time. By what law? By what usage is this limitation established? Or when have the House of Commons acknowledged its authority? A power of expulsion, indeed, means necessarily a power of exclusion, or it can answer no purpose but to expose the possessors to ridicule and contempt.*

No

* To this argument it has been answered, that the King has a power of expelling the whole House, by dissolving the parliament; yet the electors may again choose the very same members.

The

No principle of common sense (for I will not use the word Law) can possi-

The power of convoking and dissolving parliaments, is of a very different nature, and founded upon very different principles from the claim of the House of Commons to expel. I shall explain myself in the words of the president Montesquieu, treating of the English constitution.

"The legislative body should not assemble of itself: For a body is supposed to have no will but when assembled. And, besides, were it not to assemble unanimously, it would be impossible to determine which was really the legislative body, the part assembled, or the other. And if it had a right to prorogue itself, it might happen never to be prorogued; which would be extremely dangerous, in case it should ever attempt to encroach on the executive power. Besides, there are seasons, some of which are more proper than others for assembling the legislative body: it is fit, therefore, that the executive power should regulate the time of convening, as well as the duration of these assemblies, according to the circumstances and exigencies of state known to itself." Spirit of Laws, B. II. Chap. 16.

bly be more evident than that two inconsistent rights cannot subsist at the same time. If the House have a right to expel, the electors can have no right in the same sessions, within a few days, to force the same member back upon them again. This is too absurd, too ridiculous, to be maintained. It seems, however, "that repeated expulsion, even to the end of the parliament, would have answered every purpose, *without* violating the right of the electors." Is this the language of the constitution? Is this the boasted preservative of our liberties? Are the freeholders of *Middlesex* to have no representative? Does justice moreover dictate a proceeding, which involves the innocent with the guilty? Which distinguishes not between the dutiful subject, and the con-

contumacious freeholder, who acts in defiance of * law? Is no regard due to the rest of the nation? Have not the whole people of *Great-Britain* a right to expect the representative body, by which they are governed, to be complete? Or shall an arbitrary power be exercised without rule, by which half the counties of *England* may be totally deprived of their share in representation? Let the Law, by the mouth of the proper judge, speak always, the will of man never. If one man is incapable *by law*, the whole nation besides is still open to the choice of the freeholders.

* In every government, that must be acknowledged as law (till changed by the legislature) which is declared such by the proper court invested with lawful authority.

E What

What then (will it be said) can the House of Commons *create* law? Can the * resolutions of one house of parliament *make* that man incapable, who confessedly before was a *legal* representative of the people? Can such *occasional will* annihilate the rights both of the electors and the elected, and entitle a candidate to be admitted, who was not chosen by the freeholders?

I admit this power would be completely legislative. Nay more, it is a legislative power of the worst sort; which, from its own nature, *must* ever be exercised in an arbitrary manner *ex*

* Whether this be done by one or five successive resolutions, it is the same thing. If the *will* of the majority can change the law, their power is legislative.

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post facto †, with relation to a *particular* object, when the passions and prejudices of men are engaged. All I contend for is, that the House of Commons claim no such power, while they exercise their acknowledged authority of *judicially* deciding questions incidental to the elections of their own members. The consequences of expulsion were thus adjudged in strict

† This kind of legislation has ever been opposed, (even in King, Lords, and Commons) by the best friends of our constitution, upon the noblest principles. To make a law after the designation of a particular object, is in some degree to admit a Government by will. Laws should be general and universal, previously declared and made known to the people, or we should live in society without knowing the obligations it lays us under. It is the business of the judicial power to apply the law when the *particular* case occurs. See Montesquieu on the separation of these powers.

conformity to precedents, and the rule of law.

Here is no operation of *will* in these adjudications: this can only take place, in the original vote of expulsion, when they affect not to have been guided by rule, but acting upon an opinion of *propriety, fitness, expediency*, (the characteristics of legislation) turned that man out of the House, whom a majority deemed *unworthy* to sit amongst them. An inexhaustible fund of deprivation! An elegant historian observes, that when the parliament recognized the supremacy in the latter princes of the house of *Tudor*, with an *inherent* power to correct heresies †, &c. they

† In determining heresy, the crown was only limited (if that could be called a limitation) to such doctrines as had been adjudged heresy, by the

they gave an absolute uncontrollable authority to the crown, which might enter into every part of government. A story will make the application. A member of the House of Commons, being questioned in parliament concerning a book, supposed to contain opinions not altogether orthodox, which he refused to disclaim, though he had never confessed himself the author; a motion was made to expel. When, after much violent declamation, and great zeal displayed in *vindicating* the honour of the *Almighty*, the accused thus spoke: "I am willing to acknowledge myself the worst man in this House;

the authority of Scripture, by the first four general councils, or by any general councils, which followed the Scriptures as their rule, or by such other doctrines as should hereafter be denominated heresy by the parliament and convocation. 1 *Eliz. cap. 2.*

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" but

“ but I pray you, gentlemen, to con-
 “ sider, that when I am gone, the
 “ evil will still remain; and if you
 “ continue expelling the worst * mem-
 “ ber, I fear it will reach the chair
 “ at last.”

Let us now examine this power of
 expulsion, upon the several grounds
 which have been suggested. The most

* It is impossible to fix limits when opinion is
 once admitted. Scarce any cause of deprivation
 can be suggested, which may not prevail, by ana-
 logy at least to some precedent already on the
 journals of the House; and if accumulative
 charges are allowed, life, character, &c. taken
 into the account, the field becomes infinite, and
 can be bounded only by the fluctuating opinion
 of a majority. What is this but to give an ab-
 solute negative in elections? To make the re-
 presentative body at the same time co-electors
 and judges? And to confound every order of the
 state?

obvious,

obvious, and much the best foundation of this claim, will appear to be a continual exercise thereof for two centuries, acquiesced in by the legislature; and it may be urged, that should this not be deemed sufficient to establish a right, there can be no end of innovation.

In every question between the people and their governors, concerning the general distribution of political power, little regard must be had to former examples, when these in any degree clash with fundamentals. The principle upon which precedents are allowed the greatest authority, in the exercise of acknowledged powers, especially the judicial, does not apply to the present case. In directing the judgments of our courts, they limit the

the otherwise fluctuating opinions of successive judges, make known the rule of conduct prescribed to the subject, and prevent the operation of those various affections, which, tho' inseparable from human nature, are never found to be the same in any two individuals. Should a rule be once established incompatible with the order and good government of the state, there is a superior authority to whom the people may have recourse, who, by declaring their will, enact that no such rule shall prevail in future. Thus the Law becomes fixt and certain, and is truly a pillar of cloud by day, and a pillar of fire by night, to guide and direct our steps. But between the people and their governors, there can be no human tribunal; unless therefore the dispute be adjusted by

by a reference to what * is acknowledged on both sides, one only appeal can lie, that dreadful one mentioned by Mr. *Locke*, an appeal to the God of Battles. The precedents here too are established by one of the parties, without attracting the attention of the nation; should usurpation confer a right, such a principle could serve no other purpose, but to encourage new encroachments; and any power, however arbitrary or iniquitous †, might thus be surreptitiously engrafted on a like usage. Neither King, nor Lords

* The present dispute *may* be thus settled. The power claimed is irreconcilable to the sole exclusive legislative authority in King, Lords, and Commons.

† I mean not to insinuate a possibility of such usurpation in our present House of Commons, but to argue only against the principle, as establishing a right to the power by *such* a prescription.

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have

have any pretence to interfere between the people and their representatives, who form a distinct independent order in the state. The bulk of the nation are not the most refined reasoners: they feel oftener than they think; and instead of opposing a precedent from prudent apprehensions † of remote

† How much the particular effects of a measure are apt to influence our minds, may be gathered from what past lately among ourselves. The necessity for stopping the exportation of corn, to prevent a famine, was so urgent, that some of the ablest men in this country were unwarily led into a defence of a dispensing power in the Crown. They thought it impossible the authority, so beneficial in its effects, should be illegal: not adverting to a principle sufficiently established in our own history, that the utility of the *general* power, and not of the *particular* exertion, determines its legality. When Queen *Elizabeth*, to resist the *Spanish* Armada, issued orders to the several ports, commanding each to furnish

mote consequences, they seldom dream of resistance, till some unexpected consequence shews them the full extent to which the precedent † may be carried. The obstinacy or firmness (call it which we may) of the *Middlesex* Freeholders, has now produced such a crisis. The power of expulsion, with all the latent train of consequen-

furnish a certain number of ships, such was the alacrity and obedience of the nation, that many places fitted out double the number desired; but when *Charles* the First made use of the very same expedient, to govern without a parliament, it became one of the chief causes of those unhappy discontents, which at last terminated in a civil war.

† Thus the Norman lawyers, from the originally simple principles of feudal connection, established all those oppressive claims of the superior lord, which, though somewhat defined from time to time by parliament, were not finally abolished before the reign of *Charles* the Second.

ces, is drawn from that darkness and obscurity in which it hitherto has securely slumbered, and must stand or fall by its own substantial merits.

Is it necessary to add, that the acquiescence of the legislature is of no validity, where the * body claiming has an absolute negative in legislation?

The doctrine here advanced is by no means new in this country. The claims condemned in the famous Petition of Right, were certainly some of them contrary to express laws, all inconsistent with a regular limited government, but were nevertheless sup-

* It is well known that the House of Commons are very justly so jealous of their privileges, that any bill respecting these, begun in the other House, would be for that reason alone rejected by them.

ported

ported by the notorious uninterrupted
 * practice of above a century, acqui-
 esced under by the legislature, nay
 some of them indirectly affirmed by
 the Representatives of the people,
 Queen *Elizabeth* exercised throughout
 her reign above twenty articles of
 prerogative totally incompatible with
 a limited government; yet so little
 jealousy was entertained, so little were
 the rights of the people understood
 to be invaded, that these acts of
 power are rarely mentioned by the
 ordinary historians, and this Princess
 for above forty years preserved the

* Foreign jurists have affected to condemn
 the practice of our Courts as absurd, for con-
 sidering no laws as obsolete, whereas these in
 every other country may be abrogated by a con-
 trary usage. This peculiarity in our jurispru-
 dence flows from the nature of our govern-
 ment,

con-

confidence and affections of her people in a much higher degree than any Sovereign who ever sat upon the *English* throne. Had her successors enjoyed an independent revenue, with her consummate prudence, we must probably have submitted to the same fate with our neighbours on the continent, and at this instant have languished under a government unrestrained by law. The people, however, recollected in proper time, that the Parliament alone were Legislators, and there was an end of the tyranny.

The advocates for this power of expulsion have likewise said, that the House, by their *judicial* authority, declare Mr. Wilkes *shall* not sit among them. Is not this confounding the essence of things, the legislative with the judicial? Is it not perverting,
 nay

may insulting the understandings of mankind? Of what nature is this Judicature? Here is plainly no adjudication of a civil right. Whether Mr. *Wilkes* was originally capable of being elected, has never yet been made a question. He was admitted a Member; he enjoyed every privilege annexed to that character, as far as his situation would permit. He is even acknowledged as such by the very *vote of expulsion*. Is criminal jurisdiction claimed? The House of Commons will be little indebted to those who defend this very extraordinary position. They themselves plainly considered the authority by which they acted in a very different light. Would they otherwise have admitted an *accumulative* * charge? Would they a second

* It is evident that this practice once admitted, a man may be acquitted by a majority on each

second time have punished a man who had already received sentence from the proper * tribunal? Does a man become more criminal, because he is the object of popular favour? Or can censure thus inflicted answer the purpose of public example, and deter others from the commission of crimes?

each distinct charge, and yet condemned upon the whole. Is not this introducing confusion into a proceeding, upon which it is above all others the interest of mankind to distinguish.

* The distinction of the *same* and *different* judicatures (*vide* Speech, &c. lately published) is not to be maintained. Even in civil causes, it is a sufficient plea to say the affair is depending in another Court. In criminal matters no man can be a second time questioned for the same offence. The last House of Commons expelled Mr. *Wilkes* for a crime, of which he was then convicted in a Court of Law, and to undergo the proper punishment. A plain proof they acted not as Judges.

2.

The

The proceedings of the House are inconsistent with the clearest principles of natural justice, upon the ridiculous supposition of a criminal jurisdiction. It is the peculiar felicity of our country that the Members of both Houses of Parliament submit as subjects to those laws, which are enacted by themselves in quality of Legislators. It is a mistake, therefore, to imagine the House of Commons have a criminal jurisdiction even over their own Members. They may indeed punish and repress indecencies in the House, because order is necessary to every assembly, and no other power could enforce the observance without infringing the freedom of debate and independence of their legislative capacity. They meet solely as Legislators, and every power or privilege they possess, will be found incidental to this origi-

nal * character, and immediately derived from their necessary independence.

A late writer † observes, that the Sentence (as he terms it) of Expulsion

* Such as determining Elections; punishing those who attack a Member for his conduct within doors; freedom from arrests, &c. The House do not even compel their Members to pay their debts. Perhaps this might be as reasonable an exertion of *judicial* authority, if they possessed such a power. The right of determining Elections stands on its own peculiar grounds.

† See the Case of the late Election for the County of *Middlesex* considered, &c. The same writer very seriously asks, " Shall *they* be at liberty to restore him, who have no power to expel him?" And as gravely answers, " Certainly not!" Had his printer by mistake reversed the proposition, how would the following question have astonished the accurate lawyer? Shall *they* be at liberty to expel him, who have no power to restore him?

has

has been inflicted sometimes for offences against *Religion*, sometimes for offences against the *State*, sometimes for offences against *Morality*, and at other times against the *House* merely. He has here very liberally bestowed all the powers formerly exercised by the Courts of High Commission † and Star-Chamber. This catalogue contains every crime which man can commit. Every offence which zealous bigots may impute, artful politicians may frame, or perverted morality condemn. A severe scrutiny is here established into the bosoms of men, into the delicate privacy of domestic life, for matter which may exclude a man

† These Courts punished by deprivation of offices, by imprisonment, and fine. The House of Commons have formerly levied fines upon persons expelled. Sir *Robert Walpole* was expelled and imprisoned.

from representing his country in Parliament. The same writer might have added, that the forms of proceeding are faithfully copied from these applauded originals. No Accuser, distinct from the Judge ; no Record ; no written Charge ; not even Witnesses examined in presence of the party. Lives there a man in this free country, who does not blush to own such a tribunal for the punishment of crimes? Forms are essential to justice : they serve to distinguish the law from the facts, and mark with such precision every step of the proceeding, that no room is left for ingenuity to pervert, or sophistry to confound. If these are preserved, crimes of State will ever be unknown ; and if Judges of the fact are taken from the body of the people by lot, while the standing Judges pronounce the penalty of the law, their sentence

sentence will, strictly speaking, be the sentence of the law itself.

“ Suppose, for the sake of argument,” says the writer abovementioned, “ that the people, instead of assembling by their Representatives, had been personally convened, tho’ in such case every man would have a right of being present at an assembly where his own interest, among that of others, is in agitation; yet will any one say, that he may not forfeit that right, by incorum, by treachery, by immorality, &c? And are not the majority of the assembly the *sole judges* of his fitness to continue a Member? If they judge him incapable, may they not expel him? And can he ever acquire a seat in that assembly again against the sense of the

"the majority?" There is one small circumstance indeed entirely unobserved by this accurate and constitutional Lawyer, which makes the whole difference between us. The people (*i. e.* the nation, not the Commons only) have, upon *this supposition*, the supreme legislative power. They are themselves assembled: they are the State itself. The person expelled moreover is, in the *case* stated, cut off from the community. He is an alien, an outcast. If he continues with his former associates, yet he ceases to be a citizen, and becomes a slave; is governed by the *will* of others, by force. Happily, however, the House of Commons in this country pretend to no such power. They affect not a legislative capacity. * This author might,

be said to say a singular thing with

to * The learned author above mentioned constantly argues from what the House have done,

to

with equal propriety, have endeavoured to prove the present Members of that House the lineal descendents and true representatives of *Adam*, and as such entitled to all authority on earth from the immediate gift of the Creator.

The same author is not more fortunate when he endeavours to illustrate his subject from voluntary associations. Here the Union is dissolved by the same unrestrained will which created it. As each individual may withdraw himself from the body; so any number (a majority or minority) may shun an individual. But Dr. *Blackstone's* Commentaries have taught me to believe, that the Representatives of the people in *Great Britain* are elected according to a *precedent* law.

to prove what they may do. If this reasoning be conclusive, their power is indeed unbounded.

We

We are told the *Romans* had their single officer, who could degrade a Senator from his rank and station. And where can the censorship be so safely vested as in the representative body of the Commons? Is it necessary to say, the authority of the Senate at *Rome* resembled more the power of our King than of our House of Commons? The power of the Senate was chiefly executive. *Rome* was moreover a republic established on *manners*; our government is a monarchy founded on *laws*. In the first, *manners* are sacred; in the latter, *laws*. It was not the loss of the censorship at *Rome* which corrupted the manners of the people, but the corruption of manners destroyed the authority of the * censor.

It

* Their censures no longer conveyed infamy. The office and not the crime were become odious.

Montesquieu

It seems however we are under a mistake in supposing the power of expulsion

Montesquieu on this subject observes, "that at Rome, which in its early years was a kind of aristocracy, the Senate did not fill up the vacant places in their own body; the new Senators were nominated by the Censors." *B. 5. chap. 3.* The same officers that degraded, here elected. Afterwards all who had filled certain offices were entitled to seats in the Senate. *Montesquieu* thinks that this power of a censorship should exist only in republics. The peculiar business of these officers (for they were first two in number) at Rome, was, to correct those smaller offences which were not the objects of the laws, and to preserve the manners of the citizens untainted. Their power was greatest, when the laws were most simple. "The Censors, and before them the Consuls, formed and created, as it were, every five years the body of the people; they exercised legislation on the very body that was possessed of the legislative power." *Spirit of Laws, B. 11. chap. 16.* Their power entered also into domestic life; and there is an instance of a citizen compelled by the Cenfor to put away his then wife, that he might give children to the republic.

H

Upon

expulsion in any degree to resemble a legislative authority. *It is the usage of Parliament, made law by the tacit consent and acquiescence of the legislature**.

In former times our Kings exercised a power of regulating every part of government by † proclamation, somewhat

Upon the plan of a censorship our House of Commons would have abundant employment, though not altogether compatible with *law*, which in this country forms the best protection of the people.

* Answer to the Question stated.

† Queen *Elizabeth* had taken offence at the smell of Woad ; and she issued an edict forbidding the cultivation of that useful plant. She was also pleased to take offence at the long swords and high ruffs then in fashion : she sent about her officers to break every man's sword, and clip every man's ruff which was beyond a certain length. This practice resembles somewhat the method employed by the great Czar *Peter* to make his subjects change their garb.

Sir

what analogous to the temporary legislation of the *Roman* Senate. As Parliaments were seldom called together by the Sovereign, and when assembled, little affected the office of reformers, the Court of Star-Chamber took care to see those proclamations more rigorously executed than the laws themselves. This power, however, which has long been considered as illegal, without any express declaration of the legislature, is in every respect, but its extent, exactly similar to that under consideration; which is the *usage of Parliament* for *one* House of Parliament to do what they please without consent of King or Lords. The exercise of this power

Sir *Christopher Pigott* was expelled for speaking *disrespectfully* of the *Scottish* nation — Mr. *Asgill*, for believing that a man *might* go to Heaven *without dying*.

of expulsion is not limited by rule or precedent. It is confessedly an act of *will*; and if such *will* can deprive the people of their Representative, I confess, my understanding cannot discover why the House of Commons may not vote the Lords an useless part of the constitution. The Journals of the House sufficiently demonstrate that expulsions have not only been acts of will, but of violence and caprice. A power of dispensing with laws was for several ages exercised by the Crown; yet Parliament, at the Revolution, found no difficulty in declaring this claim illegal, and insisting upon all the articles specified in the Bill of Rights, as “ the undoubted *Rights* and “ *Liberties* of the nation; and that no “ Declarations, Judgments, Doings, “ or Proceedings, to the prejudice of “ the people, in any of the said premisses,

“ misses, ought in any-wise to be
 “ drawn hereafter into consequence or
 “ example.” If the foundations of a
 government are not held sacred, all
 pretence of law becomes a cruel mock-
 ery of the people. Legislation in the
 three estates is a mere fallacy, if the
 resolutions of one House of Parliament
 can innovate upon *legal* rights. Men
 may affect to believe, and endeavour
 by sophistry to inculcate, that “ if the
 “ House of Commons have assumed
 “ or exercised legislative power in the
 “ measure before us; so too do the
 “ Courts of *Westminster-Hall* in their
 “ daily determinations according to
 “ the maxims of the common law,
 “ and their daily proceedings accord-
 “ ing to their several *established* rules.”
 What is *established*? And how? Does
 not one decision of a Court in *West-*
minster-Hall fix and make known the
 Law?

Law? Are not Judges punishable if they depart from it in future? But does one expulsion become a rule for the next? Or have the House *declared* the man incapable of sitting, who is convicted of a libel? What *Law* then have they *made known*? This is the characteristic of judicial power; *Their* act is plainly an act of *will*; and when connected with a right of * determining the consequences, is completely legislative.

It

* The President *Montesquieu* thinks the separation of the legislative and judicial powers necessary to the existence of liberty. The right of determining their own elections must, for reasons peculiar to our government, be united with that part of legislation possessed by the Commons; but the confusion (not to say abuses) naturally attending this union, makes it highly proper to keep these powers separate and distinct, where the same necessity does not exist. The judicial character of the House of Lords is scarcely

an

It is yet said, should the House of Commons not possess a power of expulsion, *unworthy* persons might be returned. Cannot laws provide a remedy? Arguments have been drawn from considerations of dignity. What shall we say? Can the dignity of legislators be better supported, than by setting an illustrious example * of submission to the Law?

Thus an exception to this rule: they act only as a court of appeal; and the cause is commonly so moulded, by the forms of inferior courts, through which it passed in its way to this higher tribunal, that the matter to be discussed is merely some general abstract question of Law. The opinions of the Judges are always taken, and have deservedly the greatest weight. Nevertheless, it might not be impossible perhaps to point out some errors in point of jurisdiction, which have arisen from uniting these different characters of judges and legislators in the same body.

* The behaviour of *Henry* the Fifth, when Prince of *Wales*, is mentioned in this view, by
all

Thus have I endeavoured to prove, that every *disqualified* candidate is *no* candidate, and that all votes given to him are absolutely void: that a person expelled, by those invested with proper authority, must be incapable of readmission, because *inconsistent* rights cannot subsist at the *same* time; and that another must be chosen, lest the governing body should be maimed or imperfect: that these positions have been repeatedly established *as law* by the *known authorized Judges*: that even if these questions had been new, the authority of the House of Commons acting within their *acknowledged jurisdiction*, must now be submitted to, unless we mean to dissolve

all historians, as an instance of the greatest magnanimity. The same magnanimity displayed throughout his government, ensured the willing obedience of the people.

the government, by an appeal to the collective body of the people.

Having cleared the ground, I then proceeded to examine the original power of expulsion, and found it to be (in the extent contended for) completely legislative, and so far incompatible with the *known acknowledged* constitution of our government.

It may yet be proper to add a few words on a distinction which I have endeavoured to support. In every state the separation of the legislative and judicial powers, is necessary to the establishment of liberty. The president *Montesquieu* has not scrupled to mention this as the great distinction between the moderate monarchies of Europe, and the despotic governments

of the East; that in the former, while the prince retains the legislative authority, he entrusts the judicial to his subjects; whereas in the latter, both these powers are vested in the same magistrate. Mr. *Locke* has carried the same principle so far, as to affirm, that “ the *legislative* or supreme authority, cannot assume to itself a power to rule by extemporary, arbitrary decrees, but is bound to “ *dispense justice*, and decide the rights of the subject, by *promulgated standing laws, and known authorised judges*.” Indeed where the legislative authority is exercised by enacting *general* laws to take effect in future, *promulgated* without any view to a particular object: where an improper exercise of this power is prevented by giving a negative voice to each distinct order

order of men, who have distinct and separate interests : where the interpretation of these laws is by standing Judges, made independent in their office for life, whose decisions being preserved, render civil rights fixt and certain : where such forms of justice are established, as may separate the several questions in a cause, and distinguish every stage of the proceedings so accurately, that no opportunity be left for ingenuity to pervert, or sophistry to confound : where matters of fact are decided by the verdict of judges chosen by lot from among the people : where in criminal cases, the accused, by a privilege of rejecting a certain number, may choose his judges, in conjunction with the law : where a jury so formed, may (when a complicated question shall appear to require

it) determine both the law and the fact: where, lastly, the whole proceedings of justice are openly transacted in the public view; there, and there only, can the liberty of the subject be the direct end of the constitution.

Though the separation of legislative and judicial powers may now appear essential, yet the peculiar form of our government renders one exception necessary. The representative body of the Commons, must have a sole exclusive jurisdiction to determine the elections of their own members, or they would instantly cease to be independent. But no reason can be given for extending this judicial authority beyond what independence may require.

Whether

Whether a power to send an offending member back to his constituents, for them either to confirm or reprobate their former choice, might not be properly vested in the House of Commons, may well deserve the consideration of the legislature. The House of Commons appear to have disclaimed this (although *limited*) authority, by pertinaciously insisting upon the place-bill, when twice rejected by the Lords: so different is the conduct of men, when public regulations are proposed; and when resentments are awakened by the designation of a particular object. All I mean to contend for is, that no such limitation of authority can exist, but by the *express words* of an Act of parliament, the House of Commons being the *sole judges* of elections: and that

the general power of expulsion, as
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